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HOW SHALL THE INCREASED BUSINESS OF THE COURTS OF MANY OF THE STATES BE PROVIDED FOR?

This is a question of importance which is now presenting itself in its several phases to the citizens of many states on account of the increased litigation therein and the accumulation of work in the higher courts without a corresponding increase in the number of the judges to keep their work up to date. In some states the policy has been to increase the number of the courts of appeal. Texas has five courts of civil appeals, a court of criminal appeals and a supreme court. There is great complaint there because of the conflict of opinion between the divisions of the civil appeals courts. It is a serious question there how to get the conflicting opinions of the courts of civil appeals reconciled, in view of the constant increase of them and the failure in many cases to bring them to the supreme court.

It would seem that a good way would be for the judges of the civil court of appeals to get together, say twice a year, and hear and decide such cases as may be shown to be in conflict. Such cases as the judges of these courts could not agree upon should be cited to the supreme court for final determination. This plan might seem cumbersome at first because of the cases it would involve. But, as a matter of practice, it would take the court but a short time to determine whether an opinion was really in conflict with another of the court's opinions, so that the court would need to give but a short time to determining whether the case was properly before it. There would probably be a good many cases at first, but the ultimate result would be to bring about harmony of opinion and a decreasing number of such cases for consideration. Five months should be allowed to bring such cases to the attention of the judges of the courts of civil appeals, so that ample time would be allowed to the parties to show the conflict of opinion and have it acted upon by the full bench.

Our bar associations should be made far more effective than they now are, both as to the selection of the judiciary and the harmonizing of the laws. There is nothing more certain than that in the majority of cases candidates for the judiciary are not selected on account of their peculiar fitness for the office, but because of political influence and favoritism. It is said that Presidents Cleveland and Harrison asked to see the briefs of the candidates for the United States judgeships. There is no better way to determine a lawyer's ability than by his briefs. A lawyer's briefs show whether he is industrious or not, as well as his ability to apply principles to the facts and the relationship of both facts and principles to each other. If a president is not learned in the law sufficiently to pass on such questions, it would not be adding a great burden to the Supreme Court of the United States to call on it for aid in determining the ability of the candidates for federal judicial positions. Judging from the appointments which have heretofore been made in many parts of the country, particularly in the territories, there is great need of the examination of the candidates for judicial honors which the President may bestow. Without such precaution the President may frequently be imposed upon, though, of course, as to the appointment of the judges of the Supreme Court of the United States, history shows that the good sense of the presidents has been exercised in a satisfactory manner.

Illinois and Missouri have problems to settle in regard to the business of the courts which has been gathering till the courts cannot keep up and do satisfactory work; in fact they are behind with a great deal of show of very loose work. If five more judges were added to the Supreme Court of Illinois there would be none too many for the character of the work required. Missouri should add four new supreme judges and the same number to the courts of appeal. In Missouri the legislature has passed a bill to create a third branch of the court of appeals three times, and each time the governor has vetoed it on the ground that it was not needed. The last time, however, the governor gave as his main reason that a third branch of the court of appeals would be productive of more conflicts of opinion; that there were enough of such conflicts with two branches. One of the judges

of the Missouri court of appeals remarked recently as to this position of the governor, that while it was true, yet there were more conflicts of opinion between the two branches of the supreme court than between the two branches of the court of appeals. In view of the experience in Texas, it would seem that the position of Governor Folk was well taken.

Oklahoma and the Indian Territory having been granted statehood, in the process of its formation should profit by the experiences of the others and the conditions confronting them, and see to it that not only enough judges are provided for, but that the compensation is great enough to attract the best legal ability available. There will be many important problems to be decided and much litigation there and much to be disposed of already accumulated. The importance of these matters cannot be too highly regarded.

We believe also that if a judge has spent fifteen years on the bench, and has arrived at the age of sixty-five or seventy years the legislature of the states should permit him to retire on half pay, if he is incapacitated for further work. Such a provision would aid in inducing some of our lawyers of the very best legal ability to accept a position on the bench. A judge, as a rule, would have very little chance to regain a paying business at the ages mentioned, and having given that part of his life in which he would be expected to do the best for himself and family, it would be no more than right to make such a provision.

NOTES OF IMPORTANT DECISIONS.

MASTER AND SERVANT—INJURIES TO SERVANT FROM DEFECTIVE APPLIANCES.—In the case of Butler v. New England Construction Co., 77 N. W. Rep. 764, decided by the Supreme Court of Massachusetts some interesting questions are presented. The action was one of tort to recover for personal injuries received by the plaintiff from the fall of a boom belonging to a derrick on which he was working at the time of the accident. There was a verdict for the plaintiff.

The court said: "If the defendant's requests should have been given, judgment is to be entered for the defendant, otherwise judgment is to be rendered on the verdict for the plaintiff. We think that the rulings requested were rightly refused.

The defendant does not seriously contend that the want of a pawl on the drum, by means of which the boom was raised and lowered, did not constitute or could not have been found by the jury to constitute a defect in the derrick. It is plain that the jury were warranted in finding as they must have found, that the want of a pawl rendered the derrick defective, and that the oak stick and the manner in which it was used to keep the drum in place constituted an unsafe appliance. The defendant contends more earnestly that there was no evidence that the defect in the derrick was the proximate cause of the injury. There was no question but that the boom fell, and that it was its fall which caused the plaintiff's injuries. The defendant contends that for aught that appears the stick may have been displaced and the boom caused to fall by negligence on the part of one of the plaintiff's fellow-servants; and that, if so, that was the proximate cause of the plaintiff's injury. But the fact, if it was a fact, that negligence on the part of one of the plaintiff's fellow-servants may have contributed to the accident, would not necessarily, as matter of law, relieve the defendant. The defective and unsafe condition of the derrick might still be found to be the proximate cause of the plaintfff's injury. Lane v. Atlantic Works, 107 Mass. 104, 111 Mass. 136. The question was one for the jury, taking all the circumstances into account to pass upon, and was left to them under instructions as to what would constitute "proximate cause" which were not objected to.

The question whether the plaintiff was competent to execute the release relied on by the defendant, and understood what he was doing, was also a question for the jury. It could not be ruled as matter of law that there was no evidence that would warrant a finding that he was of unsound mind when it was executed. This position is sustained by the case of Gibson v. Western New York & P. R. R., 164 Pa. 142, 30 Atl. Rep. 308, 44 Am. St. Rep. 586. But it was held in Och v. M., K. & T. Ry. Co., 130 Mo., 31 S. W. Rep. 961, 36 L. R. A. 42, that in a personal injury suit, where the defendant pleaded a release which plaintiff claimed was procured by fraud while she was in a dazed condition as a result of the accident that, where there was no evidence of want of sufficient mental capacity to execute a release, such question should not be left to a jury. In New York the question of the validity of a release of damages executed by the plaintiff when it was claimed that it was not his free act, is for the jury." Dixon v. Brooklyn City & N. R. Co., 100 N. Y. 170, 3 N. E. Rep. 65.

ATTORNEY AND CLIENT—WHERE CLIENT BECOMES INSANE PENDING PROBATE PROCEEDING.—The case of McKenna v. Garvey (Mass.), 77 N. E. Rep. 782, presents a case where pending proceedings for the probate of a will and the appointment of an executor, the petitioner became insane, but no other adjudication than the mere

commitment to a hospital was shown. The relation of attorney and client already existing between the petitioner and his attorney of record continued as to all matters included in the original contract of employment notwithstanding such insanity. Among other things the court said: "There has been much discussion before us on the law and practice of the courts where one of the parties to the suit, appearing only for himself in a personal capacity, is insane. On this point the generally prevailing rule of law is that an insane person may appear and prosecute or defend by attorney (at least when he is not under guardianship) any ordinary action of common law, if no special reason is shown to the contrary, and that he will be bound by the result. Cunningham v. Davis, 175 Mass. 213, 56 N. E. Rep. 2; Hallet v. Oakes, 1 Cush. 296; Stigers v. Brent, 50 Md. 214, 33 Am. Rep. 317; King v. Robinson, 33 Me. 114, 54 Am. Dec. 614; Ingersoll v. Harrison, 48 Mich. 234, 12 N. W. Rep. 179; Van Horn v. Hann, 39 N. J. Law, 207; Cameron's Committee v. Pottinger, 3 Bibb (Ky.), 11. Sometimes, for his protection, it is well for the court to appoint a guardian *ad litem* to represent him. In some states the subject is governed by statutes, and the decisions in different jurisdictions are not entirely harmonious. In suits in equity the general practice is to appoint a guardian *ad litem* for insane litigants. Cunningham v. Davis, 175 Mass. 213, 56 N. E. Rep. 2. One reason for this rule in the early times was that averments and answers in equity were made by the parties under oath. Westcomb v. Westcomb, 1 Dick. 233; Howlett v. Wilbraham, 5 Madd. 423; Wilson v. Gray, 14 Ves. 172; Sturges v. Longworth, 1 Ohio St. 544. See Wartnaby v. Wartnaby, 1 Jac. 377. The case before us differs materially from an ordinary suit brought by a party on his own account. The petitioner appeared in the probate court, in an official capacity, to represent the will in the settlement of the estate of the deceased person. The suit was in the nature of a proceeding *in rem*. When the court acquired jurisdiction of the case it was beyond his power to control it, but any one interested had a right to the aid of the court in conducting the matter to a conclusion which should establish or set aside the will, and thus take a step forward towards the settlement of the estate. The petitioner's personal interest as a legatee under the will and as an heir at law of his brother did not make him a party in his personal relations to the estate, but his duty as petitioner was to represent the estate, and particularly to represent the will which purported to declare the purpose of the testator in regard to the disposition of his property. The question arises: What is the duty of the parties interested, and of the court, if one acting in that capacity becomes disqualified, or declines to proceed further in the performance of his official duty? We have no statute for a case like the present, and it must be governed by general principles applicable to the business to be done. It is the duty of the court, on being informed of the facts, to make such an order as will insure a proper determination of the questions on which the rights of the parties depend. Usually that can best be done by appointing some proper person to take the place of the executor and represent the will in conducting proceedings for the probate of it. The nature of such a case, that it is a proceeding *in rem*, has repeatedly been declared. Bonnemort v. Gill, 167 Mass. 338, 45 N. E. Rep. 768; Will of Storey, 20 Ill. App. 183; Van Alen v. Hewins, 5 Hun (N. Y.), 44, 45; Will of Lasak, 57 Hun. 417, 10 N. Y. Supp. 844; Bogardus v. Clark, 4 Paige (N. Y.), 623-626; Tompkins v. Tompkins, 1 Story, 547, Fed. Cas. No. 14,091. The first four of the cases just cited go far to indicate the proper procedure where the petitioner is disqualified to prosecute the suit. In the absence of any statutory requirement, the court is not limited to a single method. It is enough if means are taken to insure a proper presentation of the facts and arguments which ought to be considered in determining whether the will should be admitted to probate. In the present case, if the matter had been brought to the attention of the court, probably nothing better could have been done than to appoint the able and trustworthy attorney who was then representing the petitioner, to assume a new official relation as a representative of the executor and the will, under an order of the court. If that or anything like it had been done, the result would not have been changed. The will and the executor were properly represented before the court at all stages of the proceedings. We ought not to disturb the verdict for a mere informality which did not affect the result."

LEGAL COMPLICATIONS ARISING FROM GRAND JURY PROCEEDINGS.

Out of the graft cases that were being investigated before the grand jury at Milwaukee, peculiar complications have arisen by which the testimony given by a witness charging a person with extortion and bribery before the jury, is to be used as the foundation for an action for slander in a court of civil jurisdiction, and wherein the secrecy of such testimony is being questioned. These peculiar complications have arisen from a want of definiteness in expression and interpretation of the law, and have in a way caused unnecessary litigation and expense for no practical purpose. A more accurate expression and interpretation of the law would greatly facilitate its stability and would aid to raise the law to the dignity of a science. In every state in the union there are many similar in-

stances to be found in the decisions of courts of last resort. I have therefore taken this case, on account of its recent date, and I have devoted much space to a report of the initial proceeding solely for illustrative purposes.

It seems that one Strauss, an ex-supervisor, under the promise of immunity, confessed to the district attorney. He afterwards testified before the grand jury charging one Schultz with certain acts of extortion and bribery. The indictment under which Schultz was arrested alleged a specific statement made by Schultz to Strauss which was slanderous *per se*, if untrue. Schultz, after his arrest and release on bail, was discharged from his position as reporter on a daily paper, and after various attempts to gain a livelihood, in which he failed, on account of the indictments pending against him, by advice of his attorney commenced an action for slander against Strauss, in order to bring matters to a speedy issue and trial, so that he could free himself of the charge. To ascertain whether the language used and quoted in the indictment was the language used by Strauss, and for the purpose of obtaining sufficient facts to frame a complaint, the attorney for Schultz had Strauss cited under a discovery statute before a court commissioner. At the hearing the district attorney appeared, in order to protect the rights of witnesses appearing before a grand jury. The fight rested with the attorney for the plaintiff and district attorney. Arguments waxed warm. The court commissioner and plaintiff's attorney were threatened with contempt proceedings on the ground of interfering with the proceedings of the grand jury. The point was made that a court of civil jurisdiction could not interfere with the proceedings in a court of criminal jurisdiction. Before the court commissioner decided whether the witness was in contempt or not, Schultz, the plaintiff, was arrested on an indictment for perjury, growing out of the affidavit on which the order was issued citing Strauss before the court commissioner. At the same time an injunctional order was issued out of the superior court, restraining the court commissioner from adjudging Strauss guilty of contempt for refusing to answer questions regarding his defamatory evidence given before the grand jury against Schultz; also the order declared that the court commissioner had no jurisdiction in the case, and that the statements made by Strauss to the grand jury or the district attorney are privileged and secret, and cannot be made the basis of a civil suit.

In general, the arguments pro and con related to the questions arising under the injunctional order pertaining to the secrecy of grand jury proceedings and the liability of witnesses before the grand jury to action for slander, as well as to the court commissioner's authority to adjudge a witness in contempt and order his punishment. I shall briefly state a few of the propositions propounded by plaintiff and defendant.

The plaintiff set forth the following: The proceedings before a grand jury are secret only to the extent of the jurors' deliberations and vote. As to testimony given by witnesses there is no reason for withholding the same from the eye of another court whenever public or private justice requires.[1] Principle and authority demonstrate conclusively that even jurors themselves may be called to testify whenever the reason for secrecy ceases to exist.[2] The right of discovery by examining the other party is given by statute absolutely and unqualifiedly.[3] The statute is remedial, highly essential to a proper administration of justice, and its operation ought not to be suspended by a plea of public policy, questionable in itself, and still less by a refractory refusal to answer. Time is essential.[4] A wicked informer cannot be shielded from the natural consequences of his wrong doing by forbidding inquiry into his misdoings, on the ground that his testimony is privileged, is a violation of the letter and spirit of the constitutional guaranty that every person is entitled to certain remedy in the law for any wrong in his person, property or character.[5] Absolutely privileged are only words spoken in the conduct of legislative proceedings and in the language of a judge when presiding in court. With these exceptions the words must invariably have been spoken with probable cause and without malice, so as to be privileged.[6]

The defendant set forth the following: All

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statements made by witness to a grand jury and to the district attorney in his official capacity, appertaining to criminal matters, were privileged communications and absolutely secret.[7] No statement made by a witness to the grand jury and to the district attorney in his official capacity could be made the foundation for an action for slander or libel, or for any civil action for the recovery of damages.[8] Any citizen has the constitutional right to report to the district attorney or the grand jury any information which might lead to indictment of another, with absolute immunity from danger of a suit for the recovery of damages, regardless of the truth of the testimony or the personal malice of the witness.[9]

For my purpose I have deemed it sufficient to cite only those authorities that had a direct bearing upon the proposition advanced. The judge of the superior court rendered a decision granting the motion of the defendant, the effect of which was that the defendant was not required to answer questions regarding his testimony before the grand jury, and that the injunctional order temporarily staying the proceedings instituted by the plaintiff against the defendant before the court commissioner, under the discovery statute, is made permanent in so far as the examination touches upon charges made by defendant before the grand jury and district attorney. In the decision the judge held that an action for slander was not the proper remedy for the plaintiff, but intimated that there might be a remedy. Thereupon the plaintiff appealed.

The supreme court held in the above case[10] that words or statements, pertinent and material to the inquiry, made by a witness before a grand jury and to the district attorney during an investigation of an offense of which it alleged the party was guilty, were made in the course of a judicial proceeding, and were therefore privileged, and furthermore that since plaintiff has no cause of action for slander against defendant by reason of any statements made by defendant to a district attorney or his assistant, in their official capacities, or in testimony given by defendant before a grand jury, defendant could not be compelled to disclose such statements in a proceeding for discovery to enable plaintiff to file a complaint for slander.

In discussing this particular case, I have gone into more details than necessary, at the first instance of the proceedings for the following reasons: First, it shows a want of definite purpose and a lack of grasp of essentials as well as undue hostility. Second, it shows over-zealousness on the part of the prosecuting attorney in having the plaintiff indicted by the grand jury for perjury on the affidavit made by advice of counsel in the discovery proceeding, and third, it shows that although the question at issue was so well settled that no controversy could arise upon the subject-matter, yet upon the examination of authorities in the jurisdiction some doubt might have arisen as to the law. Courts of last resort in this country have generally recognized the common law rule relating to absolutely privileged communications in the case of a witness testifying in a court of law, but they are not all agreed as to the extent of the privilege, or as to the occasion, which are absolutely privileged. In an early case in this state,[11] the court held that words spoken in the course of judicial proceedings, though they impute crime to another, and therefore, if spoken elsewhere, would impart malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. But this privilege must be exercised within certain restrictions. A party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject matter of inquiry. In Calkins v. Sumner,[12] the court held that words when they are written or spoken by parties, counsel, witness, jurors or judges, in the course of a judicial proceeding are privileged, provided what is said and written be pertinent and material to the cause or subject-matter of inquiry, the speaker or writer is not liable to an action, however much he may be actuated by hatred or ill-will.

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For my purpose I have deemed it sufficient to cite only those authorities that had a direct bearing upon the proposition advanced. The judge of the superior court rendered a decision granting the motion of the defendant, the effect of which was that the defendant was not required to answer questions regarding his testimony before the grand jury, and that the injunctional order temporarily staying the proceedings instituted by the plaintiff against the defendant before the court commissioner, under the discovery statute, is made permanent in so far as the examination touches upon charges made by defendant before the grand jury and district attorney. In the decision the judge held that an action for slander was not the proper remedy for the plaintiff, but intimated that there might be a remedy. Thereupon the plaintiff appealed.

The supreme court held in the above case[10] that words or statements, pertinent and material to the inquiry, made by a witness before a grand jury and to the district attorney during an investigation of an offense of which it alleged the party was guilty, were made in the course of a judicial proceeding, and were therefore privileged, and furthermore that since plaintiff has no cause of action for slander against defendant by reason of any statements made by defendant to a district attorney or his assistant, in their official capacities, or in testimony given by defendant before a grand jury, defendant could not be compelled to disclose such statements in a proceeding for discovery to enable plaintiff to file a complaint for slander.

In discussing this particular case, I have gone into more details than necessary, at the first instance of the proceedings for the following reasons: First, it shows a want of definite purpose and a lack of grasp of essentials as well as undue hostility. Second, it shows over-zealousness on the part of the prosecuting attorney in having the plaintiff indicted by the grand jury for perjury on the affidavit made by advice of counsel in the discovery proceeding, and third, it shows that although the question at issue was so well settled that no controversy could arise upon the subject-matter, yet upon the examination of authorities in the jurisdiction some doubt might have arisen as to the law. Courts of last resort in this country have generally recognized the common law rule relating to absolutely privileged communications in the case of a witness testifying in a court of law, but they are not all agreed as to the extent of the privilege, or as to the occasion, which are absolutely privileged. In an early case in this state,[11] the court held that words spoken in the course of judicial proceedings, though they impute crime to another, and therefore, if spoken elsewhere, would impart malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. But this privilege must be exercised within certain restrictions. A party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject matter of inquiry. In Calkins v. Sumner,[12] the court held that words when they are written or spoken by parties, counsel, witness, jurors or judges, in the course of a judicial proceeding are privileged, provided what is said and written be pertinent and material to the cause or subject-matter of inquiry, the speaker or writer is not liable to an action, however much he may be actuated by hatred or ill-will.

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the petition which are pertinent and material to the subject of inquiry are privileged, and that which takes place in the ordinary course of justice is absolutely exempt from an action of libel, the court said, in Larkin v. Noonan:[13] "The same rule as to impunity should be applied in the one case as in the other." Upon this question we cannot better express our views than by adopting the just and forcible language of Senator Clinton, used by him in giving his opinion in Thorn v. Blanchard:[14] "There is a certain class of cases wherein no prosecution will lie, when the matter contained in it is false and scandalous; as in a petition to a committee of parliament; in articles of the peace, exhibited to justices of the peace; in a presentment of a grand jury; in a proceeding in a regular course of justice; in assigning, on the books of a Quakers' meeting, reasons for expelling a member; in an exposition of the abuses of a public institution, as in the case of the deputy governor of Greenwich hospital, addressed to the competent authority to administer redress. The policy of the law here steps in and controls the individual rights of redress. The freedom of inquiry, the right of exposing malversation in public men and public institutions, to the proper authority, the importance of punishing offenses, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels, in cases of that or of analogous nature." I may note here that in Schultz v. Strauss,[15] the contention was made that the above case was in conflict with Calkins v. Sumner,[16] but the court held otherwise.

In the preceding we have a clear exposition of how the law stood in that state at that time, and it will be observed that certain restrictions are made as to persons, certain specified occasions mentioned, and the contents of the words in writing must be pertinent. But by a decision rendered by Chief Justice Dixon in Noonan v. Orton,[17] a slight doubt was thrown over the law as applied to absolutely privileged communications. The Chief Justice said: "An absolutely privileged communication is one in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of slander and libel. Of such are the words spoken or written by judges in the exercise of their judicial functions, by legislators in the performance of their duties, and many others." Bailey's Wis. Digest, vol. 2, p. 1364, transcribes the above as follows: "An absolutely privileged communication is one in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of libel or slander; as where spoken or written by judges in the exercise of their judicial functions, by legislators in the performance of their duties, and the like."

An absolutely privileged communication depends upon certain elements: First, the occasion; second, the pertinency and materiality of the spoken or written words; third, the official relation and character. A careful reading of the above decision would imply that only words spoken and written by judges and legislators in the exercise of their respective functions and duties are absolutely privileged, but the court said, "and many others," which is very indefinite in meaning and must be interpreted "and the like," thereby restricting the meaning to the persons and occasions already mentioned. This case, when compared with the preceding ones, has limited the persons and occasion considerably as to absolutely privileged communication, and for that reason has given reasonable doubt as to the law on the subject. The lack of indefiniteness has not only thrown a doubt upon the law, but it has caused unnecessary litigation and expense. In the case in question, Schultz v. Strauss,[18] the court extended the occasion and the official persons to whom statements may be made and viewed as privileged. According to this decision the occasion is extended to statements made to district attorneys or their assistants in their official capacities which is to be viewed as made in the course of a "judicial proceeding." The conception of judicial proceeding is hereby extended. Further the court stated in its opinion that, "statements made to police and prosecuting officers with the design of originating and forwarding such proceedings are declared by the authorities to be within the

[13] 19 Wis. 88.
[14] 5 Johns. 507, 530.
[15] 106 N. W. Rep. 1066.
[16] 13 Wis. 193.
[17] 32 Wis. 177.
[18] 106 N. W. Rep. 1066.

rule."[19] Still, if a claim were made under the decision that statements made to a police officer were not privileged, an appeal might be taken with perfect good faith to remove the doubt or indefiniteness which the opinion imports. Unquestionably courts of last resort in rendering a decision in a particular case could enumerate conscientiously the instances, such as mentioned in the various opinions quoted from in this article, where the principle or rule in similar and analogous cases would apply so that much unnecessary litigation and expense would be saved and all doubt and indefiniteness removed from slight points and questions of law.

F. BEECHER.

Detroit, Mich.

[19] Grimes v. Coyle, 6 B. Mon. (Ky.) 301; *In re* Quarles and Butler, 158 U. S. 532, 15 Sup. Ct. Rep. 959, 39 L. Ed. 1080; Shinglemeyer v. Wright, 124 Mich. 230, 82 N. W. Rep. 887, 50 L. R. A. 129; Morrow v. Wheeler & Wilson Manufacturing Company, 165 Mass. 349, 43 N. E. Rep. 105; Wright v. Lathrop, 199 Mass. 385, 21 N. E. Rep. 963; Gabriel v. McMullen (Iowa), 103 N. W. Rep. 355; Vogel v. Gruaz, 110 U. S. 311, 4 Sup. Ct. Rep. 12, 28 L. Ed. 158.

STATUTES—TITLE—STATEMENT OF SUBJECT.

GRIFFIN v. DRENNEN.

Supreme Court of Alabama, June 30, 1905. On Rehearing, April 3, 1906.

Acts 1903, p. 108, entitled "An Act to Fix and Provide for the Salaries of Mayors in Cities in the State," and declaring that in all cities having over 35,000 population according to the last federal census the mayor shall receive a salary of $2,500, is not objectionable on the ground that its subject is not stated in its title, as required by Const. § 45.

Acts 1903, p. 108, providing that in all cities having a population of over 35,000 according to the last federal census the mayor shall receive a salary of $2,500, does not refer to the last census preceding the enactment but to the last census previous to the fixing of the salary, and hence operates upon all cities in the state which may have a population of 35,000 or over, and is not a local law, within Const. § 106, requiring notice to be given of the intended passage of local laws.

STATEMENT OF FACTS: This was a bill filed by appellant, as a taxpayer of the city of Birmingham, Ala., on behalf of himself and the other taxpayers, to require the mayor to refund to the treasurer of the said city all the money received by him as salary in excess of $2,500 from the 1st day of May, 1903, to the 31st day of December, 1904. The bill alleges the passage of an act on February 26, 1903, fixing the salaries of mayors in all cities of over 35,000 population according to the last federal census at $2,500 a year payable monthly. It also alleges that the mayor, W. M. Drennen, has continuously since the passage of this act received from the said city treasurer the sum of $300 a month, or $3,600 per annum from the 1st day of May to the 1st day of December, 1904; that the city council had taken no steps to cause said money to be refunded by said Drennen in excess of said $2,500 to the said city treasurer. The defense set up was by way of demurrer, attacking the constitutionality of the act pleaded, and motion to dismiss the bill for want of equity. W. M. Drennen, personally and as mayor, and the mayor and aldermen of Birmingham, were made parties defendant. On the final hearing the chancellor decreed the grounds of demurrer well taken and entered an order declaring said act unconstitutional and sustaining the motion to dismiss for want of equity. From this decree, this appeal is prosecuted.

ANDERSON, J.: This appeal involves the constitutionality of acts 1903, p. 108, entitled "An act to fix and provide for the salaries of mayors in cities in the state of Alabama." One would infer from the foregoing title that the act would be for the purpose of regulating the salaries of mayors in all cities of the state, regardless of size; not cities alone that contained 35,000 inhabitants, or that might hereafter reach that number, and to which class can only belong, as per the last census, Mobile and Birmingham. The body of the act is as follows:

"Section 1. Be it enacted by the Legislature of Alabama, that the salary of mayor in all cities in the state having over thirty-five thousand population, according to the last federal census, shall be two thousand five hundred ($2,500) dollars per annum, payable in monthly installments, out of the treasury of said cities.

"Sec. 2. That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby expressly repealed."

Section 45 of the constitution of 1901 provides: "* * * Each law shall contain but one subject, which shall be clearly expressed in its title." The subject of the foregoing act is manifestly for the purpose of regulating the salaries of mayors of cities belonging to a certain class, while the subject expressed in the title is for the purposes of regulating the salaries of mayors in the cities of Alabama, and is not confined to the class provided for in the body of the act. One of the purposes of this constitutional requirement, observes Judge Cooley in his Constitutional Limitations, 172, is "to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation as are being considered, in order that they may have the opportunity of being heard thereon by petition or otherwise, if they shall so desire." And this provision of our constitution is applicable to all laws, general or local, and regardless

of other requirements as to the publication of notice of the intention to apply for the passage thereof. And it makes no difference whether the act applies to cities that had a population of 35,000 under the preceding census or to those that might have that much under subsequent enumerations, except, perhaps, in testing whether it is general or local, which is unnecessary for us to decide, for in any event it has reference to only a class of cities and is not in harmony with the title. Can it be a reasonable conclusion that the title to the bill in question gave notice that the subject of the act would apply only to cities in Alabama with a population of 35,000 or that would subsequently attain to that population? We think not. On the other hand, from a reading of the title we can only infer that the act would regulate the salaries of the mayors in all the cities in Alabama, regardless of population. The act is violative of section 45 of the constitution of 1901 and must fall. If a title does not fairly and reasonably express the subject of the act, if it be misleading and deceptive, the constitution compels its condemnation. Lindsey v. U. S. Savings Association, 120 Ala. 156, 24 So. Rep. 171, 42 L. R. A. 783. The demurrers test the constitutionality of the act upon the sole ground that it is local and repulsive to sections 104 and 106 of the constitution of 1901, save the first ground, which is but a general demurrer; and under our system of pleading we would not be warranted in deciding the constitutionality of the act upon the grounds other than the ones advanced by the demurrers. A motion, however, was made to dismiss for want of equity, and the unconstitutionality of the act was assigned in challenging the equity of the bill. The motion was granted, and the decree sustaining the motion is assigned as error, and this court is authorized to determine any questions affecting the equity of the bill. The decree of the judge of the city court dismissing the bill for want of equity is affirmed.

McCLELLAN, C. J., and TYSON and SIMPSON, JJ., concur.

On Rehearing.

ANDERSON, J.: Upon the former consideration of this case we concluded that the act in question was violative of section 45 of the constitution, upon the idea that the title was deceptive and misleading, in that it did not clearly express the subject of the law as it was enacted. The title, however, provided for legislation relating to cities in Alabama, and was sufficient to inform the public and the inhabitants of each city in the state that the passage of the law would be attempted with reference to the salaries of mayors, and was germane to the subject and sufficiently comprehensive of the particulars of the body of the act. "When the subject may be comprehended in the title the act must be upheld." Mobile Co. v. City of Mobile, 128 Ala. 335, 30 So. Rep. 645, 64 L. R. A. 333, 86 Am. St. Rep. 143; Adler v. State, 55 Ala. 21; Ballentyne v. Wickersham, 75 Ala. 536; 23 Am. & Eng. Ency. Law, 229, 235; State v. Sayre, 118 Ala. 1, 24 So. Rep. 89; State v. Rogers, 107 Ala. 444, 19 So. Rep. 909, 32 L. R. A. 520; Allegany Co. Case, 77 Pa. 77; State v. Street, 117 Ala. 203, 23 So. Rep. 807; Sheppard v. Dowling, 127 Ala. 1, 28 So. Rep. 791, 85 Am. St. Rep. 68. The issue involved in the court below was whether or not the act in question was repugnant to the constitution, in that no notice was given the intended passage of same as required by section 106 of the constitution of 1901. In determining this question we must consider whether this is a general or local law. It is a fundamental rule for the construction of statutes that they will be considered to have a prospective operation, unless a legislative intent to the contrary is expressed or is necessarily to be implied from the language used. Greenwood v. Trigg & Dobbs (Ala.), 39 So. Rep. 361; Lindsey's Case, *supra*; 26 Am. & Eng. Ency. Law, 693. We do not think the act in question refers to the census of 1900, but to the last census previous to the fixing of the salary, and is not, therefore, confined in its operation to cities with a population of 35,000 or over at the time of its passage. If the law applies to all cities in the state, although but two of them may be presently affected thereby, it is a general law, if all other cities should come within the provision thereof upon attaining the requisite size. State v. Thompson (Ala.), 38 So. Rep. 679; Wheeler v. Philadelphia, 77 Pa. 338; Van Riper v. Parsons, 40 N. J. Law, 1; Matter of Church, 92 N. Y. 1.

The judge of the city court erred in sustaining the motion to dismiss and the demurrers to the bill, and the rehearing is granted, the decree of the city court is reversed, and one is here rendered overruling the motion and demurrers and remanding the cause.

Reversed, rendered, and remanded.

HARALSON, TYSON, DOWDELL, SIMPSON, and DENSON, JJ., concur.

NOTE.—*When Constitutional Provisions and Statutes Should be Construed Liberally.*—It is difficult to understand how there could have been any different opinion than that filed upon the rehearing, which is exactly the reverse of the first opinion by the same judge. It is evidence tending to show that our higher courts do not give the time for the proper consideration of the cases before them. It is certain from the number of cases before the courts that they either must hurry with their opinions or else get behind in their work.

In the first opinion the court said in regard to the acts in question: "The subject of the foregoing act is manifestly for the purpose of regulating the salaries of mayors of the cities belonging to a certain class, while the subject expressed in the title is for the purpose of regulating the salaries of mayors in the cities of Alabama, and is not confined to the class provided for in the body of the act." And further on in the original opinion: "From a reading of the title we can only infer that the act would regulate the salaries of the mayors in all the cities in Alabama, regardless of the population. * * * If a title does not fairly and

reasonably express the subject of the act, if it be misleading and deceptive the constitution compels its condemnation." The conclusion was that it was misleading and deceptive.

On the rehearing the court said: "The title, however, provided for legislation relating to cities in Alabama, and was sufficient to inform the public and the inhabitants of each city in the state that the passage of the law would be attempted with reference to salaries of mayors, and was germane to the subject and sufficiently comprehensive of the particulars of the body of the act." The title of the act was: "An act to fix and provide for the salaries of mayors in the cities in the state of Alabama." Upon the question, "when the subject may be comprehended in the the title the act must be upheld," there seems from the rehearing opinion to have been no dearth of opinion on the subject in Alabama; nor upon the proposition that "if the law applies to all cities in the state, although but two of them may be presently affected thereby, it is a general law if all cities should come within the provisions thereof upon attaining the requisite size." It is impossible to understand that such an act could otherwise be construed. In fact, if the act only applied to one city, but might be applied to any other city in the state on reaching the size provided for by the act, it could not be reasonably construed to be anything but general. "The purpose of construction, as applied to a written constitution, is to give effect to the intent of the framers and of the people who have adopted it, and it is a rule of construction applicable to all constitutions that they are to be construed so as to promote the objects for which they were framed and adopted, and to accomplish this result the extremes of both a liberal and strict construction are to be avoided and technical rules are to be excluded." 8 Cyc. of L. & P., p. 730. This proposition was given effect in the construction of the constitutional provision of Alabama in the opinion on a rehearing, though the case of Dorman v. State, 34 Ala. 216, is not cited. See note 41 Cyc. L. & P., p. 730, where cases from Arkansas, Georgia, Kentucky, Nevada, Wyoming and the Supreme Court of the United States are cited to support the text. In the case of Dorman v. State, *supra*, the court said: "A constitution is not to receive a technical construction. It is to be interpreted so as to carry out the great principles of government, not to defeat them." This language is to be applied with equal force to those statutes which are enacted for the purpose of carrying out the great principles of government. Nicholson v. Thompson, 5 Rob. (La.) 367; People v. Potter, 47 N. Y. 375.

As cities grow and require in the growth more attention to its affairs on the part of the mayors, so it becomes necessary in order to get men who are capable of managing its affairs, to provide legislation to meet the emergencies. There are many things required by a city of 200,000 inhabitants that a city of 25,000 inhabitants could neither afford nor would need, and yet in order to carry out the policy which would be necessary to grant needed relief in the city of 200,000 the legislature would be compelled to enact laws which would be of no practical benefit to the city of 25,000. Should 200,000 people be compelled to forego the benefits which would arise from needed legislation because the 25,000 people would get no benefit from such legislation? Such legislation would, to a great extent, be local; yet the law would apply to any city which would reach 200,000 inhabitants with the same force and effect. So in construing statutes the question of the public policy intended to be promoted becomes the guiding star to the interpretation of statutes and the constitutional provisions which relate to them. For these reasons the courts have held, as in the case of Dorman v. State, 34 Ala. 216, 238, that "a constitution is to be interpreted so as to carry out the great principles of government, not to defeat them." Hunt v. State, 7 Tex. App. 212, 231; Page v. Allen, 58 Pa. St. 338, 98 Am. Dec. 272. These very considerations were lost sight of in the original opinion in the principal case.

JETSAM AND FLOTSAM.

LIABILITY OF EDITOR OF NEWSPAPER FOR LIBEL.

The opinion of the United States Circuit Court of Appeals, second circuit, in Folwell v. Miller (*N. Y. Law Journal*, June 22, 1906), is of great interest as it passes on a question upon which there is little authority and, further, because it takes a position contrary to expressions in certain standard text books. It was held that an editor-in-chief of a newspaper, having general supervision of the editorial and news departments, who is neither the owner nor the publisher, is not liable for a libel published in his absence and without his knowledge or complicity.

In Newell on "Slander and Libel," p. 241, it is stated generally that "if a libel appear in a newspaper, the proprietor, the editor, the printer and the publisher are liable, either separately or together." In Odgers on "Slander and Libel," it is laid down that "the proprietor, the editor, the printer and the author are all liable to be sued." p. 157. In Townshend on "Libel and Slander," 4th Ed., sec. 252, on the other hand, a view is advanced which substantially agrees with the one now taken by the circuit court of appeals: "The proprietor or publisher is liable on proof of publication, although published against his orders; but where the editor is sued, he can be held liable only upon proof that he personally aided or procured the publication of the article in question."

The opinion of Judge Wallace satisfactorily reviews such authority as exists, and the following language from it seems to embody sound legal principle as well as to accomplish justice: "Notwithstanding these adjudications, we are not convinced that the editor's liability is commensurate with that of the proprietor. Of course, he is liable equally with the proprietor when he has personally assisted in any manner in the preparation, revision or otherwise of the publication of the libel. There is doubtless a presumption of fact that the managing editor has supervised the contents of the newspaper and performed the duties of his office in that behalf. So, doubtless, when it appears that he has actually done so, the fact that he has omitted to notice some of the contents will not relieve him from the consequences of his participation. But when it appears affirmatively that he was not on duty during any part of the time between the reception of the libelous matter by the newspaper and the publication, and could not have had any actual part in composing or publishing, we think he cannot be held liable without disregarding the settled rule of law by which no man is bound for the tortious act of another over whom he has not a master's power of control. The action of libel is not based upon neglect of duty, but is for a positive tort, and there is no reason upon which an editor, any more than any other individual, can be held re-

sponsible for such a tort when it appears that he was actually innocent of all complicity in it."

A case of this character illustrates the proper and legitimate sense of the saying that an agent or servant is responsible to third persons for misfeasance only and not for nonfeasance. If an agent actually took no part—if he was absent from the scene of an act—his neglect to do something constitutes simply nonfeasance, for which he is liable, if at all, only to his employer, and not misfeasance, for which he may be liable to third persons. If, however, he is a responsible participant in the act through which an injury occurs, his incidental neglect, as well as his positive performance, would constitute misfeasance, for which he would be liable to any person injured. Osborne v. Morgan, 130 Mass. 102.

In the case under discussion it appeared that the editor-in-chief, who was sued, was actually absent from the place where the libel was received and published. This, of course, strengthens the grounds for the decision. It seems not improbable, however, that the same principle of non-responsibility for mere nonfeasance might be applied if an editor-in-chief did happen to be physically present on the premises, but had no knowledge of the receipt or publication of the libelous matter. The extracts from the text-books above quoted and some of the opinions of courts in discussing the subject speak of the liabillity of "the editor." As to small newspapers upon which a single editor discharges the function of determining what shall be published, whether of news or comment, it is proper to hold him liable for misfeasance, if improper matter is permitted to go into the paper while he is on duty. Where, however, editorial responsibility is parceled out and subdivided, as necessarily it is in the great metropolitan dailies, there is forcible ground for maintaining that an editor-in-chief should not be held liable as for an act of misfeasance if he had no knowledge that an item was to be published, merely because he had the authority to exclude it if it had been called to his attention.—*New York Law Journal.*

CORRESPONDENCE.

PLEADING CUSTOM IN AN ACTION FOR NEGLIGENCE.

Editor of the Central Law Journal:

I have just read with interest your criticism of the opinion in the Brunke case, in the CENTRAL LAW JOURNAL of April 6th, and I have also read the opinion itself. I am inclined to think the court was right in affirming the judgment, but is wrong in its statement in the last paragraph as to what should be pleaded. When the court says "custom is not substantive but evidential in character," what do they mean? One must plead the substantive fact as required by our statute, but not the detailed evidence of that fact; but custom is a substantive fact to be averred in brief, but the proof of it may be various and lengthy, but you and Professor Wigmore are clearly correct that that substantive fact (custom) is only evidence of substantive right at law, and the court should have so instructed the jury.

I have nearly all of the volumes of the CENTRAL LAW JOURNAL, as I have always taken it from the commencement until the last few years. I consider it the best law journal in the country, and I have taken several for years. If a young lawyer will read and study every week the leading article in it only (fifty in a year) it will be worth to him in his practice many times the cost of the JOURNAL, and I wish you the best of success, as I think you deserve.

Springfield, Mo. H. E. HOWELL.

BOOK REVIEWS.

KEEZER ON MARRIAGE AND DIVORCE.

Of late years the subject of divorce has rapidly assumed a very important place in the litigation that passes through our American courts. Legislatures of several states whose policy is rather to remove than to increase the restraints placed upon the dissolution of the marriage relation, have every year managed to add some additional cause for divorce or furnish some new method of procedure for facilitating the separation. This has led to much confusion and conflict between the laws of the several states and much litigation has arisen within the past few years testing the validity of separations obtained in states whose laws are so lax as even to permit of a decree without anything like sufficient service. At this very opportune time appears a new and very valuable work on the law of Marriage and Divorce, giving the law as it is in all the states and territories, with approved forms, by Frank Keezer, of the Boston bar. We have read large portions of this new work and were delighted with its perspicuity of arrangement and the variety of the subject-matter discussed. Moreover, his conciseness and clearness of style permit the author to put into one volume what another author would consume two volumes in attempting to cover. This fact makes the work exceedingly valuable to the active practitioner who is thus able to find any point that may arise on a moment's investigation. Altogether the work is to be very highly commended and should take front rank as an authority on the questions which it proposes to cover.

Printed in one volume of 609 pages, and published by William J. Nagel, Boston.

JONES ON THE COMMERCIAL POWER OF CONGRESS.

No better monograph on the proper construction of clause 3 of section VIII of article I of the federal constitution has ever appeared than that written by Mr. Paul Jones in his work on the Commercial Power of Congress. As the author clearly points out in his introduction, there appears to be no subject of more importance, demanding the attention of the American people at the present time, than a consideration of that clause of the constitution of the United States which vests in congress the power to regulate commerce; and the importance of the subject arises as much from a steadily increasing demand for a more comprehensive plan for the regulation of trade by the legislative authority of the federal government, in pursuance of its commercial power, and to what is generally admitted to be the inadequacy of measures hitherto adopted for the regulation of certain corporations called "trusts." Statesmen and students of political economy, as well as active practitioners of law, will therefore gladly welcome the advent of Mr. Jones' thoughtful discussion of the greatest and farthest reaching of any of the powers of congress. The work is not a digest, nor even a text-book, but a deep, thorough and compre-

hensive discussion of the principle and extent of the great power thus conferred on congress.

Printed in one 12 mo volume of 245 pages and published by the author.

BOOKS RECEIVED.

Report of the Seventeenth Annual Meeting of the Virginia State Bar Association, held at Old Point Comfort, August 8, 9 and 10, 1905. Edited by John B. Minor, of the Richmond Bar. Richmond. Everett Waddey Co., 1905.

HUMOR OF THE LAW.

Advice from her lawyer, Timothy Coffin, who was prominent at the Bristol Co. bar half a century ago, once secured the acquittal of an old Irish woman accused of stealing a piece of pork. As she was leaving the court room, she put her hand to her mouth and in an audible whisper said: "Mr. Carfin, phwat'll Oi do wid d' porrak?" Quickly came the retort: "Eat it, you fool, the judge says you didn't steal it."

"Sir," said the theatrical-looking man, dropping into a lawyer's office and breathing deeply, "has a humble Thespian no recourse against the envenomed tongue of slander? Must the infective of the unwashed yokel go unrebuked? Sir, I have been called a 'ham.'"

"Is that all?" queried the lawyer.

"All!" roared the former support of Edwin Booth. "Were't not sufficient? And yet, as though the guile of me traducer had no bound, he specified 'Chicago ham' as fitting symbol of me estate."

An instant later the lawyer was drawing up the papers.

Through the courtesy of Mr. John A. Gilliam, one of the leading members of the St. Louis bar, we are informed of a recent incident which furnished interesting reading for the summer season. Mr. Gilliam entered proceeding by *scire facias*, to the June 1906 term of the St. Louis Circuit Court, to revive a judgment, the only defense to which, of course, is payment. The defendant, however, filed this very pretentious defense. After pleading payment the answer goes on to state: "This defendant further answering pleads all the provisions of the statutes of Missouri, and more partiularly Ch. 48 of the Revised Statutes, 1899." Believing himself bankrupt of a defense, it appears the defendant's attorney, in his extremity, pleaded the sweeping defense of every statute of Missouri, hoping that a more minute examination of the vast pile of statute law of Missouri, might possibly yield some defense. But Mr. Gilliam goes the defendant one better in his reply: "And for a further and more specific reply to defendant's third count, wherein he pleads 'all the provisions of the statutes of the State of Missouri, and more partiularly Chap. 48 of the Revised Statutes of the State of Missouri, of the year 1899,' plaintiff states that her attorney has diligently read all the statutes in force in the state of Missouri, from the time of settlement of the City of St. Louis on February 15th, 1763, to and including the publication, and taking effect of the laws passed by the 43rd general assembly in the year 1905, and has been unable to find any defense to this proceeding, and denies that all or any of the said provisions of the statutes of Missouri constitute any defense to this proceeding."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1 ACCIDENT] INSURANCE — Burden of Proof. — The burden of proving the death of insured by violent and external means, essential to a recovery on the policy, held discharged on establishing the death by unexplained, violent, external means.—Preferred Acc. Ins. Co. v. Fielding, Colo., 83 Pac. Rep. 1013.

2. ACTION—Joinder of Causes. — A cause of action against an administrator in his representative capacity, on a note, cannot be joined with a suit in equity against him individually to enforce such claim. — *In re* Stitt's Estate, Wis., 106 N. W. Rep. 114.

3. ACTION—Joinder of Causes.—Two or more distinct causes of action may be joined in as many counts of the same declaration, where the different counts are of the same quality or character and are not repugnant to each other.—Mobile & O. R. Co. v. Matthews, Tenn., 91 S. W. Rep. 194.

4. ADVERSE POSSESSION—Continuity of Possession.—Continuity of adverse possession held not interrupted by conveyance of land.—Botsford v. Eyraud, Cal., 83 Pac. Rep. 1008.

5. ADVERSE POSSESSION—Evidence.—On the issue of adverse possession, a party seeking to exclude from the effect of adverse occupancy certain portion of the premises involved held bound to point out such excepted portion.—Dawson v. Falls City Boat Club, Mich., 106 N. W. Rep. 146.

6. ADVERSE POSSESSION—Mistake as to Boundary.—Where the owner of land takes possession of a disputed strip up to a certain line, believed by him to be the true line, and holds adversely, the statute runs in his favor, notwithstanding mistake. — Bayles v. Daugherty, Ark., 91 S.W. Rep. 304.

7. ADVERSE POSSESSION—Temporary Abandonment.—Temporary absence from land, without any intention of finally abandoning it, did not break the continuity of possession.—Hunter v. Pinnell, Mo., 91 S. W. Rep. 472.

8. ANIMALS—Ambiguous Statute.—Acts 1905, p. 670, ch. 316, with reference to election tickets to place the small stock law in force, held ambiguous, and should be read as containing certain additional words. — Wright v. Cunningham, Tenn., 91 S. W. Rep. 293.

9. APPEAL AND ERROR—Bill of Exceptions. — Where on appeal there is no bill of exceptions, the evidence rulings thereon and a ruling on a motion for a new

trial cannot be considered. — State v. Wooldridge, Mo., 91 S. W. Rep. 125.

10. APPEAL AND ERROR—Bill of Exceptions.—A bill of exceptions will be quashed where it is not certified and identified.—State v. Paxton, Neb., 106 N. W. Rep. 166.

11. APPEAL AND ERROR—Decree Rendered After Term. —A certificate of the clerk that the decree was rendered at a certain term prevails against an indorsement on the record entry showing that it was recorded beyond the term.—Williams v. Ritchie, Ark., 91 S. W. Rep. 183.

12. APPEAL AND ERROR—Error Favorable to Party Complaining.—A defendant sued for causing the death of a person cannot complain of the inadequate damages awarded.—Louisville & N. R. Co. v. Thomas, Miss., 40 So. Rep. 257.

13. APPEAL AND ERROR—Findings of Jury.—The appellate court is bound by the finding of the jury on the facts as to the issue of negligence of the master and knowledge of the servant of such negligence. — Galveston, H. & S. A. Ry. Co. v. Udalle, Tex., 91 S. W. Rep. 330.

14. APPEAL AND ERROR — Jurisdictional Questions.— Objections to jurisdiction and that the petition failed to state facts sufficient to constitute a cause of action held reviewable, though not raised in the trial court.—Hudson v. Cahoon, Mo., 91 S. W. Rep. 72.

15. APPEAL AND ERROR—Law of the Case. — Where judgment granting a perpetual injunction has been reversed on appeal, and the injunction dissolved, the district court has no power to again issue an order to the same effect for a time at least, as the original judgment. —Kerns v Morgan, Idaho, 83 Pac. Rep. 954.

16. APPEAL AND ERROR — Leading Questions. — Although the trial court permitted leading questions to be asked and answered, appellant has no just cause for complaint where it is evident that the answers desired were not elicited from the witness.—Galveston, H. & S. A. Ry. Co. v. Fitzpatrick, Tex., 91 S. W. Rep. 355.

17. APPEAL AND ERROR—Questions Reviewable.—Where the supreme court has the jurisdiction because the validity of an ordinance is involved, the proper construction of the ordinance is not before the court.—Gies v. Broad, Wash., 83 Pac. Rep. 1025.

18. APPEAL AND ERROR—Remand to Lower Court.— On appeal in equity, cause held presented for examination *de novo*, so that decree cannot be affirmed on admissions of the answer and a recital in the decree, where record does not contain bill or evidence. — Hearst v. Profilt, Tenn., 91 S. W. Rep. 207.

19. ARBITRATION AND AWARD—Common Law Arbitration.—Arbitration statute does not invalidate all arbitrations not made in accordance therewith, but awards based on such arbitrations may be enforced as common-law awards.—Hurst v. Funsten, Tex., 91 S. W. Rep. 319.

20. ARSON—Sufficiency of Description.—An indictment for arson which alleges that the building burned was situated in a designated city sufficiently describes the building.—Ayres v. State, Tenn., 91 S. W. Rep. 195.

21. ATTORNEY AND CLIENT—Repudiation by Client.—A suitor who does not disclaim the authority of the attorney representing him in an action cannot, when unsuccessful, allege as ground for vacating judgment that the attorney had no authority.—Bacon v. Mitchell, N. Dak., 106 N. W. Rep. 129.

22. BANKRUPTCY—Title of Trustee.—A trustee in bankruptcy is vested with the title to the bankrupt's property as of the date he was adjudged bankrupt, except as to exempt property, and may enforce a trust in real estate existing in favor of the bankrupt.—Currie v. Look, N. Dak., 106 N. W. Rep. 131.

23. BANKS AND BANKING—Diligence Required in Collecting Substituted Check.—A local custom of banks to take up checks drawn upon them by their depositors with their own checks on other banks will not excuse holders from exercising the utmost diligence in collecting the substituted checks.—Noble v. Doughten, Kan., 83 Pac. Rep. 1048.

24. BENEFIT SOCIETIES—Assessments.—Under a resolution and by law of a mutual benefit society, an advance assessment paid by a member on joining the order held not applicable to a benefit assessment previously levied.—Hetzel v. Knights and Ladies of Golden Precept, Iowa, 106 N. W. Rep. 57.

25. BENEFIT SOCIETIES — Beneficiaries. — Stepfather not member of household held not a member of the family of a member of a beneficial association, under Hurd's Rev. St. Ill. 1903, ch. 73, § 1, and the provision of the benefit certificate.—Supreme Lodge, Order of Mutual Protection v. Dewey, Mich., 106 N. W. Rep. 140.

26. BENEFIT SOCIETIES—Selection of Name. — Where certain persons petitioned to be incorporated as a Young Women's Christian Association, another organization had no right to become a party to the proceedings and object, under Rev. St. 1899, § 1894, on the ground of similarity of name.—Young Women's Christian Ass'n v St. Louis Women's Christian Ass'n, Mo., 91 S. W. Rep. 171.

27. BROKERS—Commissions. — In a suit for broker's commission, whether the broker had notice of the existence of an interest of a minor in the property before he procured a purchaser held a question of fact for the court.—O'Neil v. Printz, Mo., 91 S. W. Rep. 174.

28. BROKERS—Finding Purchaser.—Where, in an action by a real estate broker to recover commissions for finding a purchaser, defendant claimed that the sale was made through efforts of another, it was error to sustain an objection to a question to defendant by his counsel, as to the circumstances under which the option was finally made to the purchaser.—Grieb v. Koeffler, Wis., 106 N. W. Rep. 113.

29. CARRIERS—Contract of Carriage.—The actual contract between a carrier and a passenger governs, notwithstanding the recitals of the ticket, which is but evidence of the contract.—Cincinnati, N. O. & T. P. Ry. Co. v. Harris, Tenn., 91 S. W Rep. 211.

30. CARRIERS—Joint Defendants.—In an action against connecting carriers for damages to shipment, held that the total damage was properly recovered from one carrier.—Missouri, K. & T. Ry. Co. of Texas v. Phillips, Tex., 91 S. W. Rep. 242.

31. CARRIERS—Loss of Live Stock in Transit —Where hogs are lost in transit, it will be presumed, in the absence of proof to the contrary, that they escaped from the last connecting carrier.—Jones v. St. Louis & S. F. R. Co., Mo., 91 S. W. Rep. 158.

32. CERTIORARI—Notice of Proceedings.—In certiorari to annul a judgment for want of jurisdiction, the party in whose favor the judgment was rendered held not entitled to notice of certiorari proceedings. — Davis v. Preston, Iowa, 106 N. W. Rep. 151.

33. CONSTITUTIONAL LAW—Criminal Procedure.—Failure of the trial court to see that testimony is read to the accused, who by reason of deafness is unable to hear the evidence, does not deprive accused of liberty without due process of law, in violation of Const. U. S. Amend. 14.—Felts v. Murphy, U. S. S. C., 26 Sup. Ct. Rep. 366.

34. CONSTITUTIONAL LAW—Encroachment on Judiciary.—Cr. Code, 1896, § 4730, as amended by Acts 1903, p. 345, making the refusal of a person to perform service or refund money previously advanced therefor *prima facie* proof of intent to defraud an employer, was not unconstitutional as an encroachment on the judiciary.—State v. Thomas, Ala , 40 So. Rep. 271.

35. CONTEMPT—Proceedings.—Affidavit made by one proceeded against for contempt for failing to obey an order of court, requiring him to produce certain books and papers, held too indefinite and evasive to require the court to give it consideration.—Methany v. Perkins, Mich., 106 N. W. Rep. 147.

36. CONTRACTS—Delay in Performance.—In action for balance due on building contract, evidence that contractors were delayed by failure of brick company to furnish brick fast enough held inadmissible.—Neblett v. McGraw & Brewer, Tex., 91 S. W. Rep 309.

37. CONTRACTS—Work and Labor.—In an action for

architect's services, an allegation that plaintiff was employed to make plans for a building, the estimated cost of which was $40,000, held a mere estimate, and not an allegation that the building that plaintiff was employed to make plans for was one that was to cost such sum.—Buckler v. Kneezell, Tex., 91 S. W. Rep. 367.

38. CONVICTS—Action for Wrongs Committed by Officers.—A person having a cause of action for indignities offered by city officials while working on the streets, on conviction for violating a city ordinance, must bring the action against the officials, and not against the city.—Bartlett v. City of Paducah, Ky., 91 S. W. Rep. 264.

39. CORPORATIONS—Liability of Directors.—Directors of insolvent corporation acting in good faith in declaring dividends held each responsible for the sum received by him.—Ebelhar v. German American Sec. Co.'s Assignee, Ky., 91 S. W. Rep. 262.

40. CORPORATIONS—Self Voted Salary of Director.—Resolution of directors fixing the salary of one of them as treasurer held void, so that the money appropriated by him as salary could be recovered for the corporation.—Greathouse v. Martin, Tex., 91 S. W. Rep. 385.

41. COSTS—Allowance for Witnesses.—While a party is not allowed to subpœna unnecessary witnesses in order to increase costs, good faith is presumed where a witness attends upon a subpœna duly issued.—Parsons Band Cutter & Self-Feeder Co. v. Sciscoe, Iowa, 106 N. W. Rep. 164.

42. COSTS—Attorney's Fees.—An action by a wife to enforce a separation agreement held not an action for divorce or alimony, entitling her to attorney's fees under the statute.—Woodruff v. Woodruff, Ky., 91 S. W. Rep. 265.

43. COUNTIES—Ditch Causing Overflow on Farm.—A county is not liable for the overflow of a farm due to the negligent construction of a ditch by the county.—Slewerssen v. Harris County, Tex., 91 S. W. Rep. 333.

44. CRIMINAL TRIAL—Habeas Corpus.—Federal courts will not release on *habeas corpus* person convicted of murder in the first degree in a state court because the court charged, in accordance with the admission of counsel, that the only question was the degree of murder.—Valentina v. Mercer, U. S. S. C., 26 Sup. Ct. Rep. 368.

45. CRIMINAL TRIAL—Indeterminate Sentence.—Indeterminate Sentence Act 1903, p. 571, ch. 375, imposes the extreme penalty prescribed by the crimes act for each degree act, or class of crime, and makes provision for the mitigation of such penalty.—*Ex parte* Howard, Kan., 83 Pac. Rep. 1032.

46. CRIMINAL TRIAL—Necessity of Disclosing Purpose of Question.—The sustaining of an objection to a question to a witness will not be reviewed on appeal unless the answer expected was made known to the trial court, and is shown by the record.—Martin v. State, Ala., 40 So. Rep. 275.

47. DAMAGES—Admissibility of Evidence to Disprove Injury.—In an action for personal injuries, evidence that plaintiff had been seen in houses of ill fame was not admissible to prove that he had not been rendered impotent by the injury.—Galveston, H. & S. A. Ry. Co. v. Fitzpatrick, Tex., 91 S. W. Rep. 355.

48. DAMAGES—Stipulated Damages.—Stipulation in building contract for $20 damages for each day's delay in performance, beyond a certain date, held liquidated damages, and not penalty.—Neblett v. McGraw & Brewer, Tex., 91 S. W. Rep. 309.

49. DEATH—Misjoinder of Parties Plaintiff.—Where a petition by two plaintiffs contained an alternative prayer for judgment in favor of one of them, there was a misjoinder of parties as to the alternative prayer.—Galveston, H. & S. A. Ry. Co. v. Heard, Tex., 91 S. W. Rep. 371.

50. DEEDS—Construction by Parties.—Where a vendor places his purchaser in possession of land under certain boundaries, the vendor cannot afterwards avail himself of any ambiguity in the conveyance.—Town of Como v. Pointer, Miss., 40 So. Rep. 260.

51. DESCENT AND DISTRIBUTION—Realty.—Resident citizens half sisters of a resident citizen who died intestate leaving neither widow nor children, and whose parents both died before him, nonresident aliens, inherit immediately and directly the lands of the deceased in the state.—State v. Ellis, Kan., 83 Pac. Rep. 1045.

52. DISMISSAL AND NONSUIT—Statute of Limitations.—A court has no power, on dismissing a cause without prejudice, to adjudge that a new action shall not be subject to the defense of limitations.—Linton v. Cooper, Neb., 136 N. W. Rep. 170.

53. DIVORCE—Enforcement of Alimony after Death of Party.—Statement as to enforcement of judgment for alimony after death of the party in whose favor it was rendered.—Gerrein's Adm'r v. Michie, Ky., 91 S. W. Rep. 252.

54. DOWER—Proceeds of Release.—An agreement for investment and disposition of proceeds of sale of a dower right held void as to the sons of the deceased husband.—Williams v. Merriam, Kan., 83 Pac. Rep. 976.

55. EASEMENTS—Implied Agreement.—A purchaser of land excluded from a public highway except by passing over the vendor's land takes a way over the vendor's land of necessity.—Bentley v. Hampton, Ky., 91 S. W. Rep. 266.

56. EASEMENTS—Private Way of Necessity.—The right of an individual to demand a way of necessity over lands of other individuals confers no right on a municipality to claim such way as a public way.—Town of Como v. Pointer, Miss., 40 So. Rep. 260.

57. EJECTMENT—Title.—In ejectment, evidence that defendants had themselves patented a portion of the land held only effective to corroborate plaintiff's claim that the land was vacant.—Asher v. Howard, Ky., 91 S. W. Rep. 270.

58. ELECTIONS—Ballots.—A political party having only a local organization may nominate a ticket for city offices and have it placed on the official ballot, so that it may be voted for by a single cross placed in a circle.—Ogg v. Glover, Kan., 83 Pac. Rep. 1039.

59. ELECTIONS—Evidence.—Ballots transmitted to the supreme court unsealed, as evidence in an election contest, do not lose their force from being temporarily intrusted by the clerk to one of the attorneys of the parties.—Ogg v. Glover, Kan., 83 Pac. Rep. 1039.

60. ELECTIONS—Validity of Ballot.—The placing of a cross in the circle and a cross in one of the squares of the same column and not in all of them is ground for rejecting a ballott.—Ogg v. Glover, Kan., 83 Pac. Rep. 1039.

61. ELECTION OF REMEDIES—Breach of Warranty.—The institution of suit for damages for breach of warranty constitutes an election by the buyer of his remedy for the breach, although he subsequently amends his complaint so as to set up a different cause of action.—Davis v. Schmidt, Wis., 106 N. W. Rep. 119.

62. EMINENT DOMAIN—Value of Property.—An instruction that the law does not allow a jury in condemnation proceedings to fix speculative, boom, or fancy values, but to determine the reasonable market, salable value of the property, held not erroneous.—Blincoe v. Choctaw, O. & W. R. Co., Okla., 83 Pac. Rep. 903.

63. EQUITY—Specific Performance.—A judgment requiring defendant to convey certain property to plaintiff on his paying a sum found to be due held within the jurisdiction of equity under the pleadings and facts.—Lawrence v. Halverson, Wash., 83 Pac. Rep. 889.

64. ESTOPPEL—After Acquired Title.—An assignee of a contract for the purchase of land held not estopped to set up his title by reason of covenants of warranty in a deed theretofore executed by his assignor.—Davis v. Denham, Ala., 40 So. Rep. 277.

65. EVIDENCE—Contract.—A letter written by the seller and accepted by the buyer of oil held a contract of sale which could not be varied by evidence of a prior contemporaneous parol agreement.—Midland Linseed Co. v. Remington Drug Co., Wis., 106 N. W. Rep. 115.

66. EVIDENCE—Order of Proof.—It is bad practice, but,

where no objection is made, the party who has the burden of the issues may introduce all the evidence pro and con upon every issue in the case; but if he introduces evidence which, unrebutted, defeats his cause of action, he does so at his peril.—Kibby v. Gibson, Kan., 88 Pac. Rep. 968.

67. EVIDENCE—Parol to Vary Fire Policy.—A policy of insurance, if its terms are free from doubt, cannot be altered by parol evidence, unless in case of fraud or mutual mistake.—Deming Inv. Co. v. Shawnee Fire Ins. Co., Okla., 88 Pac. Rep. 918.

68. EXECUTORS AND ADMINISTRATORS — Assets Justifying Appointment.—A claim for damages for death resulting from negligence of a third person is sufficient assets to justify the appointment of an administrator.—Reiter-Conley Mfg. Co. v. Hamlin, Ala., 40 So. Rep. 280.

69. EXECUTORS AND ADMINISTRATORS—Personal Liability.—Where defendant was sued as administrator of his wife's estate on a note executed by both himself and wife, he could not be held as an individual as on a cause of action in equity arising out of an estoppel or trust.—*In re* Stitt's Estate, Wis., 106 N. W. Rep. 114.

70. FEDERAL COURTS — Decision on Non-Federal Ground.—A state court cannot, by resting its judgment on some ground of local or general law, defeat appellate jurisdiction of Supreme Court of United States, if a federal right or immunity was set up or claimed.—Chicago, B. & Q. Ry. Co. v. People of State of Illinois, U. S. S. C., 26 Sup. Ct. Rep. 341.

71. FIRE INSURANCE — Warranties in Application. — Where in an application for fire insurance, the applicant warrants his answers to be true, a stipulation in the application and policy, that if any of the statements are false the policy shall be void, is reasonable.—Deming Inv. Co. v. Shawnee Fire Ins. Co., Okla., 88 Pac. Rep. 918.

72. FISH—State Regulation.—Pub. Acts 1899, p. 127, No. 88, prohibiting the possession of certain fish, held not, by reason of its title restricted in scope to fish caught within the state.—People v. Lassen, Mich., 106 N. W. Rep. 143.

73. FRANCHISES — Prohibited Transfer. — Although a government concession prohibited a sale thereof, the concessionary could sell an undivided part interest, subject to the contingency of a refusal by the government to recognize the vendee's right.—McGue v. Rommel, Cal., 88 Pac. Rep. 1000.

74. FRAUDS, STATUTE OF—Parol Gift of Land.—Equity will protect a parol gift of land, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements. — Merriman v. Merriman, Neb., 106 N. W. Rep. 174.

75. FRAUDS, STATUTE OF—Receipt of Goods.—A parol contract of sale of goods is taken out of the operation of the statute of frauds on the buyer receiving the goods bought.—Brockman Commission & Cold Storage Co. v. Pound, Ark., 91 S. W. Rep. 183.

76. FRAUDULENT CONVEYANCES—Bill of Sale.—A bill of sale of property as security for a present debt and for future advances is not fraudulent as against creditors as a matter of law.—McCormick Harvesting Mach. Co. v. Citizens' Bank of Drayton, N. Dak., 106 N. W. Rep. 122.

77. FRAUDULENT CONVEYANCES — Endowment Life Policy.—Endowment insurance policy payable to beneficiaries in case insured dies within the endowment period held not subject to the payment of a judgment in favor of a creditor of insured, in the absence of fraud in the creation of the beneficiaries' interests.—National Bank of Commerce v. Appel Clothing Co., Colo., 88 Pac. Rep. 965.

78. FRAUDULENT CONVEYANCES—Existence of Cause of Action.—The existence of a cause of action by a creditor against his debtor at the time of a voluntary conveyance by the latter must appear from the record in the action in which the creditor recovers judgment against the debtor.—Seed v. Jennings, Oreg., 88 Pac. Rep. 872.

79. GIFTS—Acceptance.—Acceptance by the donee is necessary to constitute a gift, and where it is disputed a question of fact arises to be determined on the evidence.—Mahoney v. Martin, Kan., 88 Pac. Rep. 982.

80. GIFTS—Promise to Make Gift.—A note executed by intestate and her husband during intestate's lifetime, payable out of her estate, held a mere promise to make a gift, which was unenforceable for want of delivery.—*In re* Stitt's Estate, Wis., 106 N. W. Rep. 114.

81. HOMESTEAD—Co-Tenancy.—A homestead may not be selected or created in land to which the claimant has no title otherwise than as tenant in common or joint tenant.—Schoonover v. Birnbaum, Cal., 88 Pac. Rep. 999.

82. HOMICIDE—Murder.—Murder, as used in the crimes act, is the unlawful killing of a human being with malice aforethought.—State v. Ireland, Kan., 88 Pac. Rep. 1036.

83. HOMICIDE—Previous Difficulty.—In a prosecution for assault with intent to kill, evidence of a previous difficulty between the parties is admissible to show motive, malice, and intent.—Shirley v. State, Ala., 40 So. Rep. 269.

84. INFANTS—Disaffirmance of Conveyance on Reaching Majority.—Where a father conveyed property to his minor son, and the son reconveyed the same during minority, but promptly disaffirmed the reconveyance on coming of age, the title after the disaffirmance was in the son.—Seed v. Jennings, Oreg., 88 Pac Rep. 872.

85. INJUNCTION - Agreements of Promoters.—In an action to enjoin violation of a contract entered into prior to the organization by the promoters of a mining corporation and the owners of the mining claims forming the basis for such corporation, evidence held insufficient to support a judgment in favor of the promoters.—Brown v. Bracking, Idaho, 88 Pac. Rep. 950.

86. INJUNCTION—Claims to Public Lands.—Injunction is the proper remedy to protect the possession of an occupying claimant of public lands against the other claimant's attempts to take forcible possession, where the possession is involved in a pending contest before the land department.—Zimmerman v. McCurdy, N. Dak., 106 N. W. Rep. 125.

87. INTOXICATING LIQUORS—Revocation of License.—One granted a liquor license on condition held not entitled to complain of a revocation for violation of the condition.—Belt v. Paul, Ark., 91 S. W. Rep. 301.

88. INTOXICATING LIQUORS—What Constitutes.—The intoxicating property of a liquid depends on the fact whether drank in reasonable quantities it may be intoxicating.—James v. State, Tex., 91 S. W. Rep. 227.

89. JUDGMENT—Proof of Former Adjudication.—Where the papers in a case have disappeared from the clerk's office, the final decree and entries on the rule docket are admissible to show a former adjudication in a subsequent case involving the same issues.—Russell v. Houston, Tenn., 91 S. W. Rep. 192.

90. JURY—Motion to Quash Venire.—In a criminal case a motion to quash the venire on the ground that accused had been deprived of the possession of copies of the venire and indictment held properly overruled.—Martin v. State, Ala., 40 So. Rep. 275.

91. LANDLORD AND TENANT—Conditions Precedent in Lease.—A covenant to make premises tenantable before a lessee shall be bound to occupy them or the rent begin is a condition precedent, and the lessee is not bound until it is complied with.—Fallis v. Gray, Mo., 91 S. W. Rep. 175.

92. LARCENY—Question for Jury.—Ordinarily in prosecution for larceny or robbery, when the facts are in dispute or the intent doubtful, the question should be left to the jury under proper instructions.—Triplett v. Commonwealth, Ky., 91 S. W. Rep. 281.

93. LIFE INSURANCE—Fraudulent Representations.—Insurer in a life policy held entitled to take advantage of fraudulent representations, in reliance upon which insured was reinstated, at any time within two years after the reinstatement.—Pacific Mut. Life Ins. Co. v. Galbraith, Tenn., 91 S. W. Rep. 204.

94. MANDAMUS—Trying Title to Office.—Mandamus to compel the allowance of mileage and *per diem* held not

a proper method to test the right of relators to the office of county commissioner.—Goodwin v. Sherer, Ala., 40 So. Rep. 279.

95. MASTER AND SERVANT—Assumption of Risk.—A servant assumes ordinary risks incident to the business of the master, but not those arising from the latter's negligence.—Galveston, H. & S. A. Ry. Co. v. Udalle, Tex., 91 S. W. Rep. 330.

96. MASTER AND SERVANT—Contract of Employment.—A proposal for re-employment for "this year" held to be a proposal for employment for another year, and not merely for the balance of the year.—Embry v. Hargadine-McKittrick Dry Goods Co., Mo., 91 S. W. Rep. 170.

97. MASTER AND SERVANT—Contract of Employment.—In an action against a salesman to recover commissions, whether an alleged subsequent contract superseding the former had been in fact made held for the jury.—Morrison Mfg. Co. v. Bryson, Iowa, 106 N. W. Rep. 153.

98. MASTER AND SERVANT—Contributory Negligence.—In an action against a railroad for the death of a brakeman struck by an overhead bridge, the question of decedent's contributory negligence held for the jury.—Louisville & N. R. Co. v. Thomas, Miss., 40 So. Rep. 257.

99. MASTER AND SERVANT—Defective Appliances.—A master held not liable for injuries to a servant by a piece of steel flying from a tool used in breaking rock.—Langhorn, Johnson & Co. v. Wiley, Ky., 91 S. W. Rep. 255.

101. MASTER AND SERVANT—Injuries to Third Person.—Defendant held not liable for the death of a child who was injured while attempting to alight from defendant's wagon.—Foster-Herbert Cut Stone Co. v. Pugh, Tenn., 91 S. W. Rep. 199.

102. MASTER AND SERVANT—Negligence of Superintendent.—In an action for injuries to a servant, instruction as to the servant's negligence in remaining in a dangerous place held properly refused because it ignored assurances by defendant's superintendent.—Reiter-Conley Mfg. Co. v. Hamlin, Ala., 40 So. Rep. 280.

103. MASTER AND SERVANT—Pleading Contributory Negligence.—Assumed risk and contributory negligence are pleas in confession and avoidance which must be specially pleaded, and cannot be availed of under the general issue.—Foley v. Pioneer Min. & Mfg. Co., Ala. 40 So. Rep. 273.

104. MONOPOLIES—Prohibited Combinations.—The attorney general may maintain an action to recover penalties for a violation of the anti-trust act (Act 1903, p. 110, ch. 94) on the part of a railroad and express company, without the consent or permission of the railroad commission.—State v. Missouri, K. & T. Ry. Co. of Texas, Tex., 91 S. W. Rep. 214.

105. MORTGAGES—Deed Absolute.—In an action to declare an express trust in and conveyed by absolute conveyance, an averment in the bill held not an averment that the deed was given to secure a debt.—Jacoby v. Funkhouser, Ala., 40 So. Rep. 291.

106. MORTGAGES—Failure to Record Defeasance.—Where an owner of real estate executed a warranty deed to secure a debt, which he paid, and no defeasance was recorded, a mortgage subsequently executed by grantor was valid.—Vallely v. First Nat. Bank, N. Dak., 106 N. W. Rep. 127.

107. MOTIONS—Ex Parte Order.—Where a stranger to a proceeding files a petition and obtains an *ex parte* order without notice to any of the original parties the order is a nullity.—Kerns v. Morgan, Idaho, 83 Pac. Rep. 954.

108. MUNICIPAL CORPORATIONS—Contracts With City.—One who contracts with a city to supervise the construction of sewers cannot be deprived of compensation by improper appropriation by the city of part of the sewer fund.—City of Houston v. Potter, Tex., 91 S. W. Rep. 389.

109. MUNICIPAL CORPORATIONS—Defective Sidewalks.—A city is liable for injuries resulting from a defective sidewalk, though it has no actual knowledge of the defect, if by the exercise of ordinary care it might have had such knowledge.—City of Bowling Green v. Duncan Ky., 91 S. W. Rep. 268.

110. MUNICIPAL CORPORATIONS — Navigable Waters.—Though a right of way may be granted over a batture by a city, the city can so control the batture as to enable the public to go to and return from the navigable stream and so regulate things as to enable the grantee of the right of way to use the way granted.—City of Shreveport v. St. Louis Southwestern Ry. Co., La., 40 So. Rep. 298.

111. MUNICIPAL CORPORATIONS — Ordinances as to Wages of Laborers.—An ordinance providing that the rate of wages for laborers on work done by contract for the city in the improvement of the streets shall not be less than a certain sum for a calendar day's work of eight hours is constitutional.—Gies v. Broad, Wash., 83 Pac. Rep. 1025.

112. NEGLIGENCE—Appliances Peculiarly Attractive to Children.—A stone wagon constructed with the bed below the axles, held not an appliance peculiarly attractive to children, requiring the owner to use more care than the selection of an ordinarily careful driver to use the same.—Foster-Herbert Cut Stone Co. v. Pugh, Tenn., 91 S. W. Rep. 199.

113. NEGLIGENCE—Instructions.—In an action for negligence, instruction as to contributory negligence held properly refused because not hypothesized on the jury's finding certain matter as facts.—Reiter-Conley Mfg. Co v. Hamlin, Ala., 40 So. Rep. 280.

114. NEGLIGENCE — Proximate Cause. — Where the death of one person was proximately caused by the negligence of another, the fact that the weak physical condition of the former contributed in a measure to his death does not acquit the latter of liability.—Foley v. Pioneer Min. & Mfg. Co., Ala., 40 So. Rep. 273.

115. NEGLIGENCE—Unprecedented Flood.—Though an accident resulted from the derailment of a train caused by a washout by an unprecedented flood, the railroad company was not excused where it was fully informed of the condition of the road and might have prevented the accident but for its negligence.—Galveston, H. & S. A. Ry. Co. v. Fitzpatrick, Tex., 91 S. W. Rep. 355.

116. PARTITION—Homestead.—A homestead not liable for debts of the deceased owner may be partitioned before the debts of the estate are paid.—Hild v. Hild, Iowa, 106 N. W. Rep. 159.

117. PERJURY—Elements of Offense.—In a prosecution for perjury, it is incumbent on the state to show that accused made the false statements knowing them to be false, or under such circumstances that knowledge would be imputed to him.—State v. Smith, Oreg., 83 Pac. Rep. 865.

118. PERJURY—Proof.—In a prosecution for perjury, it is sufficient to establish the oath taken and what was sworn as a predicate for the perjury by a single witness.—Adams v. State, Tex., 91 S. W. Rep. 225.

119. PLEADING—Motion for Judgment on Pleadings.—Where the pleadings raise no material issue of fact, a motion for judgment on the pleadings is properly granted.—Schoonover v. Birnbaum, Cal., 83 Pac. Rep. 999.

120. PRINCIPAL AND AGENT—Authority of Agent.—On the issue whether an agent had authority to buy certain goods for his principal, evidence held to justify a finding that the purchase was within the apparent scope of his employment.—Brockman Commission & Cold Storage Co. v. Pound, Ark., 91 S. W. Rep. 183.

121. PUBLIC LANDS—Adverse Possession.—A patentee of public lands cannot oust one who has acquired a right to the land by possession and lapse of time.—Asher v. Howard, Ky., 91 S. W. Rep. 270.

122. PUBLIC LANDS—Claims of Homesteader.—An occupying claimant of public lands cannot be ousted by a claimant under a homestead entry, where the merits of their claims are involved in a contest pending before the land department.—Zimmerman v. McCurdy, N. Dak., 106 N. W. Rep. 125.

123. PUBLIC LANDS—Grants to State.—A grant by the federal government to a state of land described by the designation of section numbers only vests no title in the

state to any specific portion until the official survey is made and approved by the federal authorities.—Clemmons v. Gillette, Mont , 83 Pac Rep. 879.

124. SALES—Evidence.—On the issue whether plaintiff sold goods to defendant or shipped them on commission, evidence held to support a finding that the goods were sold.—Brockman Commission & Cold Storage Co. v. Pound, Ark., 91 S. W. Rep. 183.

125. STREET RAILROADS—Collision with Vehicle.—The driver of a vehicle has a right to presume that a motorman will so run his car that a collision will not occur with a vehicle, even though the driver of the vehicle does not do his duty.—Latson v. St. Louis Transit Co., Mo., 91 S. W. Rep. 109.

126. STREET RAILROADS—Who are Passengers.—One attempting to enter street car, which stopped on signal, held a passenger.—Devoy v. St. Louis Transit Co., Mo., 91 S. W. Rep. 140.

127. TAXATION—Action to Quiet Title.—In an action to quiet title against purchaser at tax sale, held that the want of diligence of plaintiff and his creditor, though not a bar to their claim, might be considered by the court.—Morrison v. Turnbaugh, Mo., 91 S. W. Rep. 152.

128. TAXATION—Description of Property in Tax Deed.—The abbreviation "S E 4," employed in the description of the property conveyed by a tax deed, will be interpreted as meaning "southeast quarter," when it is explicitly used in another part of the same instrument as the equivalent of these words.—Kennedy v. Scott, Kan., 83 Pac. Rep. 971.

129. TAXATION — Statute of Limitations.—Under an agreement between a purchaser at a tax sale and the owner, the purchaser held the owner's agent in leasing the land and paying taxes thereon, so that limitations did not run against the owner until the agency was repudiated.—Hall v. Semple, Tex , 91 S. W. Rep. 248.

130. TAXATION—Tax Deeds as Evidence.—Conceding that Code, § 1444, is unconstitutional, where a tax sale is proven, the deed is *prima facie* evidence that the grantee named therein was the purchaser.—Farmers' Loan & Trust Co. v. Wall, Iowa, 106 N. W. Rep. 160.

131. TAXATION—Tax Sale.—A sale under a judgment for taxes against the apparent owner conveys a good title to the purchaser as against the true owner, whose deed is not recorded.—Wood v. Smith, Mo., 91 S. W. Rep. 85.

132. TELEGRAPHS AND TELEPHONES—Delay in Transmitting Message.—In an action against a telegraph company for delay in transmitting a message, evidence held to show actionable negligence.—Western Union Telegraph Co. v. Campbell, Tex., 91 S. W. Rep. 312.

133. TELEGRAPHS AND TELEPHONES—Nondelivery of Message.—A telephone company, having taken a message to the place to which it was addressed and found that the addressee was at a distant point, held required to do nothing more than to report this to the sender.—Cumberland Telephone & Telegraph Co. v. Atherton, Ky., 91 S. W. Rep 257.

134. TENANCY IN COMMON—Vendor's Lien.—Vendor's liens, continued for the beneficiary in a deed of trust given to raise money to pay the notes creating such liens, held superior to the lien of the co-tenant on the grantor's share for rents and profits wrongfully retained by such grantor.—Flach v. Zanderson, Tex., 91 S. W. Rep 348.

135. TRESPASS—Destruction of Crops.—The failure of an owner to exercise ordinary care in repairing a fence torn down by another so as to keep stock from trespassing on his crops is contributory negligence.—Gulf, C. & S. F. Ry. Co. v. McMurrough, Tex., 91 S. W. Rep. 320.

136. TRESPASS TO TRY TITLE — Evidence. — Where plaintiff in trespass to try title did not plead title by limitation, evidence that he had paid the taxes on the land for over 30 years was not material.—Moore v. Kempner, Tex., 91 S. W. Rep. 336.

137. TRIAL—Demurrer to Evidence. — When a party upon whom rests the burden of the issues introduces evidence which *prima facie* defeats his cause of action, and then rests his case, and the opposite party demurs to the evidence, it is error for the court to overrule the demurrer.—Kibby v. Gibson, Kan., 83 Pac. Rep. 968.

138. TRIAL—Deposition.—Refusal of court to appoint special commissioner to take depositions on motion for new trial held not error.—Devoy v. St. Louis Transit Co., Mo., 91 S. W. Rep. 140.

139. TRIAL—Striking Out Evidence.—Where evidence is admitted without objection and the witness is cross-examined, it cannot be stricken out on motion.—Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co., Mont., 83 Pac. Rep. 886.

140. TRIAL — Withdrawal of Instruction. — Where a charge referring to allegations in certain counts which had been eliminated was afterwards withdrawn by the court, there was no ground of objection.—Reiter-Conley Mfg. Co. v. Hamlin, Ala , 40 So. Rep. 280.

141. TRUSTS — Agreements for Purchase of Land. — Where a contract between plaintiff and defendant for the purchase of land for plaintiff's benefit was not performed by plaintiff, he could not enforce any right to the land against defendant on the purchase of the property by the latter.—Gloeckner v. Kittlaus, Mo., 91 S. W. Rep. 126.

142. TRUSTS—Mortgages.—A trust agreement held to constitute the trustee a second mortgagee in possession as to the title, and a trustee as to the rents and profits, which trust terminated on foreclosure of the first mortgage.—Marquam v. Ross, Oreg., 83 Pac. Rep. 852.

143. TRUSTS—Resulting Trusts.—A bill to declare an express trust in lands held insufficient on which to base the claim of a trust in the lands arising or resulting by implication of law.—Jacoby v. Funkhouser, Ala., 40 So. Rep. 291.

144. WATERS AND WATER COURSES—Flowage of Land.—Railroad company held not liable for flowage of plaintiff's land which would not have occurred but for digging a ditch by county.—Siewerssen v. Harris County, Tex., 91 S. W. Rep. 383.

145 WATERS AND WATER COURSES — Reservations in Irrigation Contract.—Reservation in contract for use of water from irrigation canal held not to bind users to pay any part of operating expenses of an extension of a canal.—Riverside Heights Water Co. v. Riverside Trust Co., Cal., 83 Pac. Rep. 1003.

146. WILLS—Claims and Counterclaim.—Under Code, § 3296, the rendition of judgment for defendant, in an action attacking a will, on the theory that the allegations of the answer and prayer were equivalent to a counterclaim, held error.—Davis v. Preston, Iowa, 106 N. W. Rep. 151.

147. WILLS—Setting Aside Judgment.—Heirs at law expressly consenting to a decree probating a will, the court, having jurisdiction of the subject-matter and of the person, cannot thereafter, without any showing of fraud, have such decree set aside.—Camplin v. Jackson, Colo., 83 Pac. Rep. 1017.

148. WITNESSES — Effect of Examination of Adverse Party.—Where a party makes a witness of his adversary who would otherwise be incompetent, he can testify as fully as any other competent witness.—Strode v. Prommeyer, Mo., 91 S. W. Rep. 167.

149. WITNESSES — Evidence as to Character of Deceased.—In a prosecution for homicide, defendant held not concluded by the answer of a witness that deceased's reputation for peace and quiet was good, nor precluded from proving that such was not the fact when deceased was intoxicated.—People v. Lamar, Cal., 83 Pac. Rep. 993.

150. WORK AND LABOR—Architect's Services.—In an action against an executrix for architect's services rendered to her testator, circumstantial evidence held sufficient to show plaintiff's employment and the rendition of the services at decedent's request.—Buckler v. Kneezell, Tex., 91 S. W. Rep. 367.